

Discrimination Complaint Processing Update

**From the Deputy Assistant Secretary
for Resolution Management
Office of Resolution Management**



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From the Deputy Assistant Secretary

INCREASING PRODUCTIVITY



One way to help increase your organization's productivity is to develop mechanisms to address workplace disputes at the earliest opportunity, thereby, reducing the time your staff spends away from their normal duties because of their involvement in workplace disputes---EEO and others. I am not implying that you should attempt to impede their ability to either pursue or respond to a complaint or dispute. *You should never do that.*

I am talking about eliminating as many causes of complaints as possible by helping to create employer-of-choice environments and in using early resolution techniques, such as mediation, to address complaints at the earliest opportunity. This may involve using mediation as a first step rather than other more time consuming and costly complaint resolution processes.

You always "win" with mediation. You can't "lose." You may not always reach a settlement, but both sides are likely to come away with an increased understanding of the points of view of the other party because they have sat down together and discussed the issues. This increased understanding, based on their open and frank discussions with one another, can point the way for future improvements in their working relationships.

Fewer disputes and the earlier resolution of disputes have big pay-offs to the real "bottom-lines" - lower cost, higher morale, improved quality, increased productivity, greater employer and customer satisfaction.

Clearly, you and your organization win when your employees' energies are focused on the duties they were hired to perform rather than lengthy, time-consuming grievance and complaint processing. Failing to adequately address workplace complaints early on can give the appearance that we are willing to focus both our time and energy, and that of our employees, on the complaint and grievance processes rather than the needs of our customers. Lets put the focus where the focus belongs – *Service to Veterans*. Prevention and early resolution help us to do just that.

James S. Jones

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Highlights of Regulations and Programs

Mediation Awareness

Deputy Secretary, Leo S. Mackay, has authorized the release of these important remarks concerning mediation awareness. These remarks were prepared for the Executive Mediation Awareness training that was held at VACO on January 14, 15, and 16, 2003.

It's fitting that VA's Senior Leaders are meeting on this day, the 74th birthday of Dr. Martin Luther King, Jr., the Nation's foremost advocate for nonviolence and conciliation of our time. Dr. King's powerful legacy underwrites the principles of conflict resolution and mediation that are the reason for today's program.

In 1964, on accepting the Nobel Peace Prize, Dr. King told his audience that, *"Civilization and violence are antithetical concepts."*

He said, *"... man must evolve for all human conflict a method which rejects revenge, aggression, and retaliation."*

If, 35 years after Dr. King's death, we are to develop strategies for our litigious society, then alternative dispute resolution, ADR, is the answer. If we are to deal effectively with conflict and diversity in the work place, then ADR is the answer. If we are to create at VA an *Employer-Of-Choice* environment, then ADR must be part of the answer.

Conflict, of course, is normal. We will always have complaints and grievances. There will always be reasonable differences among reasonable people. It is the way we respond to those differences that is vitally important. As with any large organization, how we deal with conflict can have a lasting effect on our ability to meet our mission.

As you well know, VA is experiencing significant changes in the way we do business. We are witnessing sweeping transformations and cutting-edge initiatives across the board. We are all part of a reinvention process designed to meet the challenges of a new time and the demands of a new century.

As members of the Department's senior leadership tier, I need not tell you that change can bring about conflict. And conflict can be divisive, disruptive and damaging. It is up to you, and the managers and supervisors, who work for you, to intervene and address employee disputes before they become locked in an adversarial *no man's land*.

Use the resources available to address workplace complaints and grievances. Commit to a positive approach by demonstrating joint ownership of concerns and solutions. Encourage your employees to use the mediation process to resolve differences quickly, less formally, and with more efficient use of resources than traditional EEO complaint and labor grievance mechanisms.

It is a proven problem-solving process that is voluntary, confidential, mutually agreed upon, and unbiased. It is available to all VA employees. And, most important, it works!

The use of mediation and other forms of alternative dispute resolution have roots deep in our history. They derive from our Nation's fourth president, James Madison, and his strong belief in personal rights and responsibility. Madison pressed hard for the addition of a Bill of Rights to our Constitution, believing personal freedoms needed to be formally protected. He wrote,

"In a society, [in] which the stronger faction can readily unite and oppress the weaker, anarchy may as truly reign as in a state where the weaker individual is not secured against the violence of the stronger."

The ability of the majority or more powerful to inflict its will on the minority or less powerful has no role in mediation. No arbiter or committee determines a so-called "winner" or "loser" and outside forces do not control the process. The outcome is shaped by those engaged in the process. It is the ultimate forum for settling conflict through self-determination. Mediation, then, is inherently American. It means people sitting down to discuss issues, understand each other's perspectives, and seek out mutual common ground on which to resolve differences. Mediation benefits employees, our Department, and in the end, veterans. After all, the *business* of VA is veterans and their families.

We cannot afford to have our employees mired in lengthy, nonproductive disputes. We want VA employees working on VA issues that directly benefit veterans. The whole purpose of ADR is to get to the *bottom-line*, if you will. For us, that *bottom-line* is measured by high quality services, efficient use of resources, customer satisfaction, and, I might add, employee satisfaction as well.

The true value of alternative dispute resolution extends beyond conference rooms, courtrooms, and schoolrooms. It helps to remind our society about the concept of civility. By its very nature, it calls on people to talk and listen to one another and then resolve their differences in a civilized manner. It is convincing evidence that there is an alternative to confrontation.

If we are to reach our goal of national Employer of Choice, we ideally want to sustain an environment that gives no cause for an employee to file a complaint or grievance. Prevention is always more satisfactory, efficient, and cost-effective.

In the real world, however, we recognize that, from time to time, we will have complaints. That being the case, we must make every effort to use early resolution techniques and resources to resolve them as quickly as possible.

I urge each and every one of you to take advantage of mediation mechanisms. As important, I ask that you encourage others to use it. As I travel around the country to field and staff offices, I will inquire about its availability and effectiveness.

I am convinced that by employing progressive measures like mediation, we are investing in our work force. We are working to fashion a more effective VA. And, ultimately, we are ensuring veterans receive the benefit of employees secure in the knowledge that VA is providing them the optimal support, programs, and environment by which to do their jobs.

We owe it to our employees and we owe it to ourselves.”

Executive Mediation Awareness Training

The Office of Resolution Management (ORM), the Office of Alternate Dispute Resolution, and the VA Learning University (VALU), offered three 6-hour *Mediation Awareness Sessions* for VACO Senior Executive Service and Grade 15's on January 14, 15, and 16, 2003 in Washington, DC. The Justice Center of Atlanta, one of the Nation's top mediation training organizations, conducted the training. The course introduced participants to the principles of conflict resolution and the use of mediation for resolving workplace disputes. Approximately 180 top VA managers and supervisor's attended this training.

The Justice Center of Atlanta also offers a three-day *Senior Executive Mediation* course, available to VA executives, in Atlanta, Georgia. The next scheduled course dates are May 6 to May 8, 2003. For more information on this course, please contact our Learning Resources Center at 727-319-1232 or visit our Learning Resources Web site at

<http://vaww.va.gov/orm/ormlr/calendar.doc>.

Mediation Training for Management and Union Officials

The Office of Resolution Management's
Learning Resource Center
Is offering a three day seminar:

Introduction to Mediation for Management and Union Officials

When: April 1, 2003 to April 3, 2003
Where: ORM Learning Center, Bay Pines, Florida

For more information contact our
Learning Resource Center at (727) 319-1231

Introduction to the Mediation Process Satellite Broadcast

The Employee Education System, Durham Resource Center, in collaboration with the Office of Resolution Management (ORM) is pleased to announce an upcoming VA Knowledge Network satellite broadcast.

This 30-minute video serves as an introduction to the mediation process. Each stage of the process is explained and demonstrated so that VA Employees will have a better understanding of mediation as a tool for resolving workplace disputes.

The benefits of watching are:

- *Provides participants with information, which will help foster the use of mediation as a means of reducing discrimination complaint activity.*
- *Provides current information on one form of alternative dispute resolution.*
- *Allows participants to choose*
- *the most convenient broadcast time during any tour of duty.*
- *Informative training without travel expense.*

The viewing dates and time are:

Date, Time, Channel

4/6, 8P ET, CH 1
4/7, 2P ET, CH 1
4/8, 11A ET, CH 1
4/9, 11P ET, CH 1
4/10, 6P ET, CH 1
4/11, 2A ET, CH 1
4/12, 11A ET, CH 1

OGC Role in Witness Testimony before an EEO Investigator

By John Klein, Assistant General Council, Professional Staff Group IV

The view of Professional Staff Group IV, is that the longstanding policy of the Office of General Counsel - albeit an informal policy - is that when the VA investigates an EEO complaint, the General Counsel does not participate in or attend the taking by the investigator of a sworn statement from a witness, including the VA employee named as the Responsible Management Official. * Is this policy absolute? Perhaps not, under particularly compelling circumstances, but I do not recall a circumstance in which we supported an exception. Our rationale follows.

1. The law provides: The Secretary shall provide that the employment discrimination complaint resolution system within the Department be established and administered so as to encourage timely and fair resolution of concerns and complaints. The Secretary shall take steps to ensure that the system is administered in an objective, fair, and effective manner and in a manner that is perceived by employees and other interested parties as being objective, fair, and effective (38 USC 516(a)). An EEO complaint is investigated to provide the Secretary, as well as the complainant, with a fair and objective portrayal of the matter. The investigatory phase of a complaint, unlike the hearing phase of a complaint, is intended to be a non-adversarial, administrative inquiry, with which all employee witnesses are required to cooperate. Appearance of an OGC attorney with or on behalf of a witness is incompatible, in fact or in appearance, with the non-adversarial nature of the investigation.

2. By law: The General Counsel is the chief legal officer of the Department and provides legal assistance to the Secretary concerning the programs and policies of the Department (38 USC 311). Thus, the lawyers of the OGC are counsel for the Secretary; they are not the representative of a witness. Even in the hearing phase, the OGC agency representative is advocating for the Department, he or she is not the personal representative of the individual witness. The Office of General Counsel is obliged to provide objective legal services to all components of the Department, consistent with the Secretary's needs and law, and must support the non-adversarial nature of the investigation phase of EEO complaint processing.

3. Even if an OGC attorney were to appear with a witness during an investigation, the value of such appearance to a witness is questionable. A complete, responsive statement must be given by the witness in an investigation, based on his or her best recollection. The witness has that duty; the attorney cannot remove it. The attorney cannot speak for the witness nor "place words in the witness' mouth".

4. Any question of accurate reproduction of a statement can and should be addressed when a copy of the investigator's transcript is provided for review and signature. ORM procedure now provides that every witness will be given the

opportunity to review and sign his or her statement, and he or she should identify any material inaccuracies in the statement and address them when returning the statement to the investigator.

5. An OGC lawyer is authorized to provide legal guidance to a witness, including the Responsible Management Official, prior to the time of a statement. The lawyer can explain the process, the respective responsibilities of all involved, encourage the witness to provide a full and complete statement on the matters being inquired about, and assist the witness in identifying aspects of his or her view of the matter which are of particular importance in the compilation of the investigatory record.

6. An OGC lawyer is also authorized to assist the VA in reviewing the investigative summary to ensure that it accurately reflects all evidence, including the testimony of the witnesses. Any apparent material inconsistency may and should be brought to the attention of the appropriate ORM official, e.g., the ORM Field Manager, by management. Similarly, management should advise ORM if there is any question about the conduct of an investigation.

*Except in that unusual circumstance in which the ORM investigates by conducting a fact-finding conference.

Surviving EEO Complaints

“Surviving EEO Complaints - A Handbook for Federal Managers” by Sarah S. Tuck is intended to help federal managers understand the federal sector EEO process. This guide is designed to increase a manager’s understanding of the role that they play in trying to avoid complaints and in responding to complaints when they are received, and to provide commonsense ideas about how to survive allegations of discrimination.

Copies of *“Surviving EEO Complaints – A Handbook for Federal Managers”* can be obtained from Dewey Publications, Inc., P.O. Box 663, Arlington, Virginia 22216-0663; telephone: (703) 524-1355.

For more information on the EEO process, contact the Office of Resolution Management (ORM) at 1 888 737-3361 (1 888 RES-EE01) or 1 888 626-9008-TDD for the hearing impaired. You can also visit our Web site at <http://www.va.gov/orm>.

The Office of the Deputy Assistant Secretary for Resolution Management publishes the Discrimination Complaint Processing Update quarterly. Please E-mail Terry Washington, External Affairs Program Analyst or Tyrone Eddins, External Affairs Program Manager, to submit recommendations, suggestions, or comments on the information presented in this newsletter. We can be reached at (202) 501-2800 or by fax at (202) 501-2885. Additional information on our services and programs is available on our Web site at <http://vaww.va.gov/orm> (Intranet) or <http://www.va.gov/orm> (Internet).